

1 DANA N. LEVITT, PC (CA Bar No. 77180)  
2 CHARLES E. WEIR (CA Bar No. 211091)  
3 JASON D. STRABO (CA Bar No. 246426)  
McDERMOTT WILL & EMERY LLP  
2049 Century Park East, Suite 3800  
Los Angeles, CA 90067-3218  
4 Telephone: 310.277.4110  
Facsimile: 310.277.4730  
5 dlevitt@mwe.com  
cweir@mwe.com  
6 jstrabo@mwe.com

7 Attorneys for Defendant  
8 THE THOMAS KINKADE COMPANY,  
9 FORMERLY KNOWN AS, MEDIA ARTS  
GROUP, INC.

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

14 DAVID KAYNE, an individual citizen of  
Georgia,

15 Plaintiff,

16 v.

17 THE THOMAS KINKADE COMPANY,  
18 formerly known as MEDIA ARTS  
GROUP, INC., a Delaware Corporation,,

19 Defendant.

CASE NO. C 07-4721 (JF) (RS)

**REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF THE THOMAS KINKADE  
COMPANY'S MOTION TO DISMISS  
PURSUANT TO F.R.C.P. RULE 12(B)(6);  
DECLARATION OF CHARLES E. WEIR  
IN SUPPORT THEREOF**

**HEARING**

**DATE: November 30, 2007**  
**TIME: 9:00 a.m.**  
**JUDGE: Hon. Jeremy Fogel**

1 TO ALL THE PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT pursuant to Federal Rule of Evidence 201, plaintiff The  
3 Thomas Kinkade Company (“TKC”) hereby respectfully requests that the Court take judicial  
4 notice of the following documents:

5 1. Answering Statement Combined with Counterclaim, dated February 2, 2003, filed  
6 by Plaintiff David Kayne (“Kayne”) in the matter *Media Arts Group, Inc. v. David Kayne, Tracy*  
7 *Kayne, and Kayne Galleries of Georgia, Inc.*, AAA Case No. 74 181 02154 02 SAT. A true and  
8 correct copy of this document is attached to the Declaration of Charles E. Weir In Support the  
9 Request for Judicial Notice in Support of the Thomas Kinkade Company’s Motion to Dismiss  
10 Pursuant to F.R.C.P. 12(b)(6) (the “Weir Declaration”) as Exhibit 1. Such a document is the  
11 proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs. v. Michele Audio Corp.*  
12 *of America*, 2006 U.S. Dist. LEXIS 65948, \*4-5 (M.D.N.C. July 19, 2006) (holding that a AAA  
13 case file is “capable of accurate and ready determination by resort to sources whose accuracy  
14 cannot reasonably be questioned,” within the meaning of Fed. R. Evid. 201 and therefore subject  
15 to judicial notice).

16 2. Respondent / Cross-Claimants’ Arbitration Brief, dated February 16, 2004, filed  
17 by Kayne in the matter *Media Arts Group, Inc. v. David Kayne, Tracy Kayne, and Kayne*  
18 *Galleries of Georgia, Inc.*, AAA Case No. 74 181 02154 02 SAT. A true and correct copy of this  
19 document is attached to the Weir Declaration as Exhibit 2. Such a document is the proper subject  
20 of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist. LEXIS 65948 at \*4-5.

21 3. Reasons For Award, dated July 6, 2004, issued by the arbitration panel *In the*  
22 *Matter of the Arbitration between The Thomas Kinkade Company v. David Kayne and Tracey*  
23 *Kayne and Kayne Art Galleries, Inc.*, AAA Case Number 74 181 021254 02 SAT. A true and  
24 correct copy of this document is attached to the Weir Declaration as Exhibit 3. Such a document  
25 is the proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist.  
26 LEXIS 65948 at \*4-5.

27 4. Concurring and Dissenting Decision of Judge Dandurand, dated June 22, 2004,  
28 issued by the arbitration panel *In the Matter of the Arbitration between The Thomas Kinkade*

1 *Company v. David Kayne and Tracey Kayne and Kayne Art Galleries, Inc.*, AAA Case Number  
 2 74 181 021254 02 SAT. A true and correct copy of this document is attached to the Weir  
 3 Declaration as Exhibit 4. Such a document is the proper subject of judicial notice. Fed. R. Evid.  
 4 201; *Investor Rels. Servs.*, 2006 U.S. Dist. LEXIS 65948 at \*4-5.

5 5. Award, dated August 27, 2004 Final Award of the Arbitration Panel, issued *In the*  
 6 *Matter of the Arbitration between The Thomas Kinkade Company v. David Kayne and Tracey*  
 7 *Kayne and Kayne Art Galleries, Inc.*, AAA Case Number 74 181 021254 02 SAT. A true and  
 8 correct copy of this document is attached to the Weir Declaration as Exhibit 5. Such a document  
 9 is the proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist.  
 10 LEXIS 65948 at \*4-5.

11 6. Defendant's Memorandum in Opposition to Plaintiff's Motion to Confirm  
 12 Arbitration Award, dated November 23, 2004, filed in the matter *The Thomas Kinkade Company*  
 13 *v. David Kayne et. al.*, filed in the United States District Court for the Northern District of  
 14 California Case No. CV-04-0186-MISC (SI). A true and correct copy of this document is  
 15 attached to the Weir Declaration as Exhibit 6. This document is the proper subject of judicial  
 16 notice. Fed. R. Evid. 201; *Doran v. Eckold*, 409 F.3d 958, 962, fn. 1 (8th Cir. 2005) (court of  
 17 appeals took judicial notice of documents filed and orders issued in prior case); *Molus v. Swan*,  
 18 2007 U.S. Dist. LEXIS 58997, at \*18 (S.D. Cal. Aug. 13, 2007) (taking judicial notice of filings,  
 19 and statements contained within filings, in prior California State Court action).

20 7. Declaration of David Kayne in Opposition to Plaintiff's Motion to Confirm  
 21 Arbitration Award and In Support of Defendants' Motion to Vacate or Modify Arbitration Award  
 22 Pursuant to 9 U.S.C. §§ 10, 11, dated November 23, 2004, filed in the matter *The Thomas*  
 23 *Kinkade Company v. David Kayne et. al.*, filed in the United States District Court for the  
 24 Northern District of California Case No. CV-04-0186-MISC (SI). A true and correct copy of this  
 25 document is attached to the Weir Declaration as Exhibit 7. This document is the proper subject of  
 26 judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997,  
 27 at \*18.

8. Order Denying Plaintiff's Motion to Confirm Arbitration Award and Granting Defendants' Motion to Vacate or Modify Award, dated January 10, 2005, issued by the Hon. Susan Illston of the United States District Court for the Northern District of California in the matter *The Thomas Kinkade Company v. David Kayne et. al.*, Case No. CV-04-0186-MISC (SI). A true and correct copy of this document is attached to the Weir Declaration as Exhibit 8. This document is the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

9. Brief in Support of Motion for Temporary Restraining Order, dated September 13, 2006, filed in the Superior Court of Fulton County State of Georgia matter *David Kayne v. The Thomas Kinkade Company*, File No. 2006CV121748. A true and correct copy of this document is attached to the Weir Declaration as Exhibit 9. This document is the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

10. Plaintiff's Brief in Response to Defendant's Motion to Compel Arbitration and Motion to Dismiss, dated November 3, 2006, filed in the matter *David Kayne v. The Thomas Kinkade Company*, United States District Court for the Northern District of Georgia Case No. 1:06-CV-2168-CAP. A true and correct copy of this document is attached to the Weir Declaration as Exhibit 10. This document is the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

11. Order, dated March 29, 2007, issued in the matter *David Kayne v. The Thomas Kinkade Company*, Case No. 1:06-CV-2168-CAP by Hon. Charles A. Pannell, Jr. of the United States District Court for the Northern District of Georgia in the matter. A true and correct copy of this document is attached to the Weir Declaration as Exhibit 11. This document is the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

12. Second Amended Petition for Declaratory Judgment and Injunctive Relief, dated April 27, 2007, filed in the matter *David Kayne v. The Thomas Kinkade Company*, United States District Court for the Northern District of Georgia Case No. 1:06-CV-2168-CAP. A true and

1 correct copy of this document is attached to the Weir Declaration as Exhibit 12. This document is  
2 the proper subject of judicial notice. Fed. R. Evid. 201; *Doran*, 409 F.3d at 962; *Molus*, 2007  
3 U.S. Dist. LEXIS 58997, at \*18.

4 13. Brief of Appellant, dated June 18, 2007, filed in the United States Court of  
5 Appeals for the Eleventh Circuit matter *David Kayne v. The Thomas Kinkade Company, Inc.*,  
6 USCA Case No. 07-11983-H. A true and correct copy of this document is attached to the Weir  
7 Declaration as Exhibit 13. Such a document is the proper subject of judicial notice. Fed. R. Evid.  
8 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

9 14. Brief of Appellant, dated August 20, 2007, filed in the United States Court of  
10 Appeals for the Eleventh Circuit matter *David Kayne v. The Thomas Kinkade Company, Inc.*,  
11 USCA Case No. 07-11983-H. A true and correct copy of this document is attached to the Weir  
12 Declaration as Exhibit 14. Such a document is the proper subject of judicial notice. Fed. R. Evid.  
13 201; *Doran*, 409 F.3d at 962; *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

14 15. Scheduling Order, dated September 12, 2007, issued in the matter *The Thomas*  
15 *Kinkade Company v. David Kayne*, AAA Case Number 74-181-E-000733-06. A true and correct  
16 copy of this document is attached to the Weir Declaration as Exhibit 15. Such a document is the  
17 proper subject of judicial notice. Fed. R. Evid. 201; *Investor Rels. Servs.*, 2006 U.S. Dist. LEXIS  
18 65948 at \*4-5.

19 16. The Commercial Arbitration Rules and Mediation Procedures of the American  
20 Arbitration Association, as amended and effective September 1, 2007. A true and correct copy of  
21 this document is attached to the Weir Declaration as Exhibit 16. This document is “capable of  
22 accurate and ready determination by resort to sources whose accuracy cannot reasonably be  
23 questioned” and is therefore the proper subject of judicial notice. Fed. R. Evid. 201.

24 17. Order, dated October 3, 2007, issued by the United States Court of Appeals for the  
25 Eleventh Circuit in the matter *David Kayne v. The Thomas Kinkade Company, Inc.*, USCA Case  
26 No. 07-11983-H. A true and correct copy of this document is attached to the Weir Declaration as  
27 Exhibit 17. Such a document is the proper subject of judicial notice. *Doran*, 409 F.3d at 962;  
28 *Molus*, 2007 U.S. Dist. LEXIS 58997, at \*18.

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Dated: October 4, 2007

McDERMOTT WILL & EMERY LLP

By: \_\_\_\_\_/s/  
Charles E. Weir  
Attorneys for Defendant  
THE THOMAS KINKADE COMPANY

McDERMOTT WILL & EMERY LLP  
ATTORNEYS AT LAW  
LOS ANGELES

**DECLARATION OF CHARLES E. WEIR**

I, Charles E. Weir, declare as follows:

1. I am a partner with the law firm of McDermott, Will & Emery, LLP, counsel of record for plaintiff The Thomas Kinkade Company ("TKC"). I have personal and first hand knowledge of the facts stated herein, and if called upon, I could and would testify competently thereto.

2. A true and correct copy of Plaintiff David Kayne's ("Kayne") Answering Statement Combined with Counterclaim filed on February 3, 2003 in the matter Media Arts Group, Inc. v. David Kayne, Tracy Kayne, and Kayne Galleries of Georgia, Inc., AAA Case No. 74 181 02154 02 SAT (the "San Francisco Arbitration") is attached hereto as Exhibit 1.

3. A true and correct copy of Respondent / Cross-Claimants' Arbitration Brief filed on February 16, 2004 in the San Francisco Arbitration is attached hereto as Exhibit 2.

4. A true and correct copy of the Reasons for Award issued by the San Francisco Arbitration panel on July 6, 2004 is attached hereto as Exhibit 3.

5. A true and correct copy of Judge Dandurand's Concurring and Dissenting Opinion dated June 22, 2004 is attached hereto as Exhibit 4.

6. A true and correct copy of the San Francisco Arbitration panel's Final Award dated August 27, 2004 is attached hereto as Exhibit 5.

7. A true and correct copy of Kayne's Memorandum in Opposition to Plaintiff's Motion to Confirm Arbitration Award in the matter The Thomas Kinkade Company v. David Kayne et. al., United States District Court for the Northern District of California Case No. CV-04-0186-MISC (SI) (the "Northern California Action") filed on November 23, 2004 is attached hereto as Exhibit 6.

8. A true and correct copy of the Declaration of David Kayne in Opposition to Plaintiff's Motion to Confirm Arbitration Award and In Support of Defendants' Motion to Vacate or Modify Arbitration Award Pursuant to 9 U.S.C. §§ 10, 11 filed November 23, 2004 in the Northern California Action is attached hereto as Exhibit 7.

1           9.       A true and correct copy of Hon. Susan Illston Order Denying Plaintiff's Motion to  
2 Confirm Arbitration Award and Granting Defendants' Motion to Vacate or Modify Award dated  
3 January 11, 2005 is attached hereto as Exhibit 8.

4           10.       A true and correct copy of Kayne's Brief in Support of Motion for Temporary  
5 Restraining Order in the Superior Court of Fulton County State of Georgia matter David Kayne v.  
6 The Thomas Kinkade Company, File No. 2006CV121748 filed on September 13, 2006 is  
7 attached hereto as Exhibit 9.

8           11.       A true and correct copy of Kayne's Brief in Response to Defendant's Motion to  
9 Compel Arbitration and Motion to Dismiss in the matter David Kayne v. The Thomas Kinkade  
10 Company, United States District Court for the Northern District of Georgia Case No. 1:06-CV-  
11 2168-CAP (the "Georgia Action") filed on November 3, 2006 is attached hereto as Exhibit 10.

12           12.       A true and correct copy of Hon. Charles A. Pannell, Jr.'s Order in the Georgia  
13 Action dated March 29, 2007 compelling arbitration is attached hereto as Exhibit 11.

14           13.       A true and correct copy of Kayne's Petition for Declaratory Judgment and  
15 Injunctive Relief in the Superior Court of Fulton County State of Georgia matter David Kayne v.  
16 The Thomas Kinkade Company, File No. 2006CV121748 filed April 17, 2007 is attached hereto  
17 as Exhibit 12.

18           14.       A true and correct copy of the Brief of Appellant in the United States Court of  
19 Appeals for the Eleventh Circuit matter David Kayne v. The Thomas Kinkade Company, Inc.,  
20 USCA Case No. 07-11983-H (the "Eleventh Circuit Appeal") filed June 18, 2007 is attached  
21 hereto as Exhibit 13.

22           15.       A true and correct copy of the Reply Brief of Appellant file in the Eleventh Circuit  
23 Appeal on August 20, 2007 is attached hereto as Exhibit 14.

24           16.       A true and correct copy of arbitrator John J. McCauley's Scheduling Order dated  
25 September 12, 2007 in the matter The Thomas Kinkade Company v. David Kayne, AAA Case  
26 Number 74-181-E-000733-06 is attached hereto as Exhibit 15.



1           17.     A true and correct copy of The Commercial Arbitration Rules and Mediation  
2 Procedures of the American Arbitration Association, as amended and effective September 1,  
3 2007, is attached hereto as Exhibit 16.

4           18.     A true and correct copy of the Eleventh Circuit Court of Appeals' Order dated  
5 October 3, 2007 affirming Judge Pannell's order is attached hereto as Exhibit 17.

6           19.     I declare under penalty of perjury under the laws of the United States of America  
7 that the foregoing is true and correct and that this declaration is executed this 4th day of October,  
8 2007 in Los Angeles, California.

9  
10 Dated: October 4, 2007

McDERMOTT WILL & EMERY LLP

11  
12 By: \_\_\_\_\_ /s/  
13 Charles E. Weir  
14 Attorneys for Defendant  
15 THE THOMAS KINKADE COMPANY  
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McDERMOTT WILL & EMERY LLP  
ATTORNEYS AT LAW  
LOS ANGELES